Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Peninsular and Oriental Steam Navigation Company v. *Tsune Kijima and others, from Her Britannic Majesty's Supreme Court for China and Japan; delivered 20th July* 1895.

Present:

THE LORD CHANCELLOR (LORD HERSCHELL).
LORD WATSON.
LORD MACNAGHTEN.
LORD SHAND.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

On the 30th of November 1892 a collision occurred between the "Chishima," an Imperial Japanese cruiser, and the "Ravenna," a steamship belonging to the Appellants, the Peninsular and Oriental Steam Navigation Company. The "Chishima" sunk immediately, and there was great loss of life among these on board.

On the 29th of November 1893, under the Act 9 & 10 Vict. c. 93, commonly known as Lord Campbell's Act, a suit was commenced against the Appellants by petition in Her Majesty's Court for Japan, on behalf of 62 different persons, or groups of persons, who were all joined as co-Plaintiffs. The petition alleged that the disaster was caused solely by the negligence of the servants of the Appellants. And each of the

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persons and groups of persons who together constituted the Plaintiffs on the Record claimed to represent some one of the seamen on board the "Chishima" who were drowned in the shipwreck and to be entitled separately to damages for the injury resulting from his death.

On being served with the petition the Appellants applied for an order that the suit should be dismissed with costs, on the ground that distinct causes of action were improperly joined in the petition. The application was granted by the the Court of First Instance, but the order was discharged with costs by the Supreme Court of China and Japan from whose decision the present appeal has been brought.

As the appeal to Her Majesty in Council came on to be heard *ex parte* the Respondents were not represented at the Bar, but their case was very fully and very ably stated in a written argument addressed to the Supreme Court which left nothing more to be said on their behalf.

It appears that the Rules of Her Majesty's Courts in China and Japan, which were framed under an Order in Council dated the 9th of March 1865, do not contain anything bearing upon the question beyond what may be gathered from the following provisions:—

Rule 39. "In case a petition states two or "more distinct causes of suit by and against "the same parties, and the same rights, the "Court may either before or at the hearing, if "it appears inexpedient to try the different "causes of suit together, order that different "records be made up, and make such order "as to adjournment and costs as justice "requires.

"In case a petition states two or more "distinct causes of suit, but not by or "against the same parties, or by and against "the same parties but not in the same

" rights, the petition may, on the applica-
" tion of any defendant, be dismissed.

" In case such application is made within
" the time for answer, the petition may be
" dismissed, with substantial costs to be paid
" by the plaintiff to the defendant making
" the application; but in case the applica-
" tion is not made within the time for
" answer, the petition, when the defect is
" brought to the notice of the Court, may
" be dismissed without costs, or upon pay-
" ment of Court fees only, as to the Court
" seems just."

Rule 339. " In all matters not in these rules
" expressly provided for, the procedure of
" the Superior Court and of Justices of the
" Peace in England in like cases shall, as
" far as possible, be followed, save that with
" respect to matters arising under the Ad-
" miralty or other special jurisdiction, the
" procedure of the Court having such
" jurisdiction in England shall, as far as
" possible, be followed."

The view of the Supreme Court was that the language of Rule 39 was permissive only, and that Rule 339 had the effect of bringing in the procedure of the Superior Courts in England. Accordingly they held that the Court had a discretion in the matter, and founding their decision on the judgment of the Court of Appeal in England in *Hannay* v. *Smurthwaite* (1892 2 Q.B. 412), which was then unreversed, they came to the conclusion that under all the circumstances of the case that discretion ought to be exercised in favour of the Plaintiffs in the action.

The judgment of the Court of Appeal in *Hannay* v. *Smurthwaite* has since been reversed by the House of Lords, *Smurthwaite* v. *Hannay*

(1894 A. C. 494); and it is clear that such a suit as the present is not and never was maintainable in England. The result is that the arguments on which the Respondents succeeded before the Supreme Court are now turned against them. They are compelled to fall back on the Rules of the Courts of China and Japan, and there they are met with this difficulty, that nothing is to be found in those Rules to warrant the joinder in one suit of different and distinct causes of action not being causes of action by and against the same parties. There is no authority there express or implied for so great a departure from settled practice.

The language of Rule 39 is no doubt, in form, permissive. The reason why that form was adopted is not perhaps quite clear. It may have been intended to leave room for the introduction of any change of procedure that might be sanctioned in England, or it may have been used merely to emphasize the point that a suit wrongly constituted by the joinder of distinct causes of action by different persons may be dismissed on the application of any defendant without regard to the nature of his interest in the litigation. Whatever the true explanation may be, it is, in the opinion of their Lordships, impossible to construe the language of the Rule with regard to the dismissal of such suits as impliedly authorizing their institution.

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be allowed with costs and the suit dismissed with costs in the Supreme Court and the Court of First Instance.